NO. 84-1558

Office - Supreme Court, U.S.
FILED
APR 1 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

IN RE:
PAN AMERICAN WORLD AIRWAYS, INC., ET AL

Petitioners

ON PETITION FOR
WRITS OF MANDAMUS AND PROHIBITION TO
THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

FRANCIS G. WELLER
755 Magazine Street
New Orleans, Louisiana 70130
Telephone: (504) 581-5141

Counsel for Petitioners,
Pan American World Airways, Inc.
and United States Aviation
Underwriters, Incorporated

ROBERT E. KERRIGAN, JR.
EMMET J. SCHWARTZMAN
DEUTSCH, KERRIGAN & STILES
(Of Counsel)

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

26 pp

QUESTIONS PRESENTED

IS IT LEGAL ERROR FOR THE DISTRICT COURT TO REFUSE A REQUEST THAT PROCEEDINGS BE RECORDED?

SHOULD A WRIT OF MANDAMUS LIE WHERE THE TRIAL COURT DENIES A PARTY'S REQUEST PURSUANT TO 28 U.S.C. §753(b), TO CONDUCT THE PROCEEDINGS ON THE RECORD?

The United States Court of Appeals, Third Circuit, and the United States Court of Appeals, Eighth Circuit, have answered "Yes" to these questions.

The United States Court of Appeals, Fifth Circuit, by denying an application for writs of mandamus and prohibition, has answered "No."

PARTIES TO THE PROCEEDING

Counsel for petitioners certifies that the parties to this proceeding are petitioners Pan American World Airways, Inc. and United States Aviation Underwriters, Inc., and respondent The Honorable Adrian G. Duplantier, United States District Judge for the Eastern District of Louisiana.*

* The United States of America is a party in interest in all actions arising from the crash of Pan American Flight 759, by virtue of an agreement entered into with Pan American World Airways, Inc. and United States Aviation Underwriters, Inc., whereby the United States will bear a substantial portion of every final judgment.

The subsidiaries of Pan American and the members of the insurance group that is managed by United States Aviation Underwriters, Inc. are listed in Appendix D and Appendix E, respectively.

STATEMENT PURSUANT TO SUPREME COURT RULES 26-27

Counsel for petitioners certifies that the person against whom relief is sought is The Honorable Adrian G. Duplantier, United States District Judge for the Eastern District of Louisiana.

The writ is in aid of the Court's appellate jurisdiction. Without a contemporaneous verbatim record of the proceedings below, effective and fair appellate review will be precluded.

This writ is sought under exceptional circumstances warranting the exercise of the Court's discretionary powers. Numerous cases pending below may be irreparably prejudiced by the district court's refusal to abide by an Act of Congress, 28 U.S.C. §753(b).

No relief is available in any other court because the United States Court of Appeals, Fifth Circuit, has denied petitioners' application for writs of mandamus and prohibition, and has denied a petition for rehearing and a suggestion for rehearing *en banc*. A direct appeal, after the litigation in the district court is completed, clearly cannot remedy the district court's error.

TABLE OF CONTENTS

PAGE

Questions Presented i
Parties to the Proceeding ii
Statement Pursuant to Supreme Court Rules 26-27 . . . iii
Table of Contents iv
Table of Authorities v
Opinion Below 1
Jurisdiction 1
Statutory Provisions Involved 2
Statement of the Case 3
Reasons for Granting the Writ 4

The district court improperly refused to comply with a binding Act of Congress, causing irremediable prejudice that thwarts the appellate jurisdiction of this Court, thus warranting the exercise of this Court's discretionary powers.

Moreover, a conflict between a decision by the United States Court of Appeals, Fifth Circuit, and decisions by the United States Court of Appeals, Third Circuit, and the United States Court of Appeals, Eighth Circuit, compels issuance of a writ to resolve the question of whether 28 U.S.C. §753(b) mandates, on request, the fundamental protection of a verbatim record of pre-trial proceedings.

Conclusion 9
Certificate of Service 10
Appendix A A-1
Appendix B A-4
Appendix C A-5
Appendix D A-7
Appendix E A-9

TABLE OF AUTHORITIES

CASES: **PAGE**

City of Pittsburgh v. Simmons,
729 F.2d 953 (3rd Cir. 1984) 6, 7

Jaconski v. Avisun Corporation,
359 F.2d 931 (3rd Cir. 1966) 7

National Farmers Organization, Inc. v. Oliver,
530 F.2d 815 (8th Cir. 1976) 6

Washington v. Clemmer,
339 F.2d 715 (D.C. Cir. 1964) 7

STATUTES:

28 U.S.C. §753(b) . . . . . i, iii, iv, 2, 3, 4, 5, 6, 7, 8, 9

28 U.S.C. §1651(a) 2

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

IN RE:
PAN AMERICAN WORLD AIRWAYS, INC., ET AL

Petitioners

ON PETITION FOR
WRITS OF MANDAMUS AND PROHIBITION TO
THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

Petitioners Pan American World Airways, Inc. and United States Aviation Underwriters, Inc., respectfully pray that writs of mandamus and prohibition issue directing the Honorable Adrian G. Duplantier, United States District Judge for the Eastern District of Louisiana, to conduct pre-trial proceedings on the record, in the presence of an official court reporter, as requested by petitioners.

OPINION BELOW

No opinion was rendered by the Court of Appeals, Fifth Circuit. However, the district court's response to petitioners' application for writs of mandamus and prohibition, and the Fifth Circuit's denials of the application, petition for rehearing and suggestion for rehearing *en banc* appear in Appendices A, B and C.

JURISDICTION

The Court of Appeals denied petitioners' petition for

rehearing and suggestion for rehearing *en banc* on February 22, 1985. The jursidiction of this Court is invoked pursuant to 28 U.S.C. §1651(a).

STATUTORY PROVISIONS INVOLVED

Section 753, Title 28 of the U.S. Code, "Reporters", and more specifically the first paragraph of 28 U.S.C. §753(b):

> "(b) Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. The regulations promulgated pursuant to the preceding sentence shall prescribe the types of electronic sound recording or other means which may be used. *Proceedings to be recorded under this section include* (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) *such other proceedings as a judge of the court may direct or as may be required by rule or order of court [or] as may be requested by any party to the proceeding.*"[1] (Emphasis added.)

---

[1] Apparently, in printing the text that follows the 1982 amendment to this subsection, the word "or" was inadvertantly omitted. (P.L. 97-164, Section 401.) Prior to the amendment (which generally dealt with the utilization of electronic sound recording in lieu of shorthand or mechanical recordation), the sentence read: "(3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding." The "or" had been incorporated into the statute since originally enacted in 1944 as 28 U.S.C. §9a (*See also*, House Report No. 868, November 16,

STATEMENT OF THE CASE

This matter arises from the multidistrict litigation relating to the crash of Pan American World Airways Flight 759 in Kenner, Louisiana on July 9, 1982.

Since the inception of the litigation, the district court has made extensive use of pre-trial proceedings to narrow issues, establish guidelines, set deadlines, obtain stipulations, effect discovery and to render other substantive and procedural decisions. The pre-trial proceedings often involve numerous consolidated cases with a number of attorneys in attendance representing their respective clients. Some proceedings have been conducted on the record, in the presence of an official court reporter, whereas others have been off the record.

On January 30, 1984, petitioners moved the district court to conduct pre-trial proceedings on the record.

On February 3, 1984, the district court denied the request, stating,

> "The motion and memorandum assert no reason for the request, no necessity for a reporter. Our court reporters are busy...."

(Footnote 1 continued)
1943.) The legislative history of the 1982 amendment suggests no intention to omit "or", and, in fact, expressly provides: "*Section 401 also does not amend the types of proceedings which are required to be recorded pursuant to 28 US..C. 753(b).*" One unofficial publication, United States Code Service, has retained the "or" despite the unintentional omission in the 1982 amendment. Of course, the statute's original language is clear and sensible, while the 1982 omission merely makes the sentence awkward. In either case, the statute mandates a verbatim transcript of court proceedings when requested by a party.

The court advised petitioners, however, that they would be permitted "to bring a 'private' reporter to the conferences."

Accordingly, petitioners' court reporters duly recorded the proceedings of over a score of status conferences and pre-trial conferences in 1984, and petitioners regularly relied on the transcripts as an accurate record of the pre-trial proceedings for trial and appellate purposes.

However, moments before a pre-trial conference on January 4, 1985, the district court barred petitioners' private court reporter from the conference, and informed petitioners that they would no longer be allowed to have pre-trial proceedings recorded by a court reporter.

On January 9, 1985, petitioners filed a new request and motion to conduct pre-trial proceedings on the record, in accordance with 28 U.S.C. §753(b) as interpreted and applied by the only appellate courts that had addressed the issue. The motion was denied the same day, without written or oral reasons.

Petitioners filed an application for writs of mandamus and prohibition on January 23. A response was filed by the district court on January 29 (Appendix A), and the Court of Appeals, Fifth Circuit, denied the application for writs on February 1. (Appendix B.) A petition for rehearing and a suggestion for rehearing *en banc* were filed on February 7, and both were denied on February 22. (Appendix C.)

REASONS FOR GRANTING THE WRIT

Petitioners have exhausted all other means of

adequate relief under these most exceptional circumstances. The district court has usurped judicial power by disregarding the specific mandate of 28 U.S.C. §753(b), thereby thwarting prospective appellate jurisdiction by denying petitioners the opportunity to make a complete record. The only redress available to petitioners lies with this Honorable Court, which should exercise its discretionary powers and grant the writ.

28 U.S.C. §753(b) lays down a fundamental rule applicable to each and every suit pending in the federal court system. This court should eliminate any uncertainty created by conflict among the circuits and lay down a uniform interpretation of the statute.

Petitioners are clearly entitled to the relief sought in the courts below. The Court of Appeals provided no reasons for its denial of petitioners' application for writs, where petitioners were denied the fundamental protection of a verbatim record of pre-trial proceedings. However, the district court, in its response to the petition for mandamus, attempted to justify denying petitioners' request that pre-trial proceedings be conducted on the record, by suggesting:

1) Status conferences and pre-trial conferences in the Eastern District of Louisiana are not conducted on the record;

2) Pre-trial orders are entered and minute entries are often issued by the court;

3) There is no reason to have a court reporter attend pre-trial proceedings;

4) The presence of a court reporter can be counter-productive because counsel can speak more frankly when their remarks are not being recorded verbatim;

5) Actions taken at pre-trial proceedings are not ordinarily the subject of appellate review; and

6) The taxpayers should not subsidize petitioners' "whim" by conducting pre-trial proceedings on the record in the presence of an official court reporter.[2]

Similar reasoning was expressly rejected by the Court of Appeals for the Third Circuit in *City of Pittsburgh v. Simmons,* 729 F.2d 953 (3rd Cir. 1984), and by the Court of Appeals for the Eighth Circuit in *National Farmers' Organization, Inc. v. Oliver,* 530 F.2d 815 (8th Cir. 1976). Both appellate courts held that a writ should issue where a party's request that pre-trial proceedings be conducted on the record is denied. *City of Pittsburgh,* above, at 955; *National Farmers' Organization,* above, at 816. Moreover, both circuits construed 28 U.S.C. §753(b) to require a verbatim record of pre-trial proceedings when so requested by a party. *City of Pittsburgh,* above, at 956; *National Farmers' Organization,* above, at 817.

In granting the writ, the Eighth Circuit in *National Farmers' Organization,* above, observed that "it is doubtful that any error in holding off the record proceedings could be effectively corrected on direct appeal following

[2] The district court also suggested that "sanctions should be imposed upon petitioners for once again frivolously wasting the time of both the district and appellate court." This allegation had no merit when examined in the context of *City of Pittsburgh, infra,* and *National Farmers' Organization, infra.* No sanctions were imposed by the Court of Appeals.

the termination of the district court litigation." *Id.*, at 817. The Third Circuit in *City of Pittsburgh*, above, at 955, reasoned:

> "To deny record availability to counsel is to deny protection to both counsel and the court itself. Indeed, the best protection for the litigants, the bar, and the bench at trial and on appeal is a verbatim record. Rather than having to speculate upon what was said and the manner in which an argument was made, the court then has before it, when a record is taken, the exact words of counsel and the exact words and rulings of the court...."

The *City of Pittsburgh* court concluded:

> "In our opinion, it is always a mistake—and indeed, in light of 28 U.S.C. §753 and the cases interpreting that statute, it is legal error—for the court to refuse a request that the proceedings be recorded...." [Footnote omitted.] *Id.*, at 956.

See also, Jaconski v. Avisun Corporation, 359 F.2d 931, 936, n. 12 (3rd Cir. 1966) (appeal demonstrated "the desirability of having a court reporter present at pre-trial conferences and causing the reporter to record verbatim the proceedings..."); *Washington v. Clemmer*, 339 F.2d 715, 717 (D.C. Cir. 1964) (failure to record criminal preliminary hearing may not ultimately be prejudicial, but impossible to predict such an eventuality; supervisory power exercised to require stenographic recording; failure to grant a request that proceeding be recorded held to be abuse of discretion.)

The decision by the Fifth Circuit directly conflicts with the well-reasoned opinions in both the Third and Eighth Circuits. A writ should issue to resolve the conflicting interpretations of 28 U.S.C. §753(b) and the question

of whether a party can obtain supervisory relief when denied the fundamental protection of a verbatim record of pre-trial proceedings.

Petitioners do not suggest that it is appropriate to record *all* pre-trial proceedings. There are times, such as settlement conferences, when all parties and the court may desire to speak off the record. The statute recognizes this right. However, where, as in the instant case, a party requests a verbatim record, the court should grant the request in accordance with 28 U.S.C. §753(b). It is a simple matter to go off the record, where appropriate, if there is no objection.

Verbatim recordation is the only effective means by which to record accurately events that occur before a suit is actually tried. Without such a record, the appellate courts are presented with only a partial record from which to render an opinion. Decisions made by the court and the parties during pre-trial proceedings are often as important in an appeal as are evidentiary rulings and factual testimony at trial.[3] Pre-trial proceedings are certainly no less important, and a party should be afforded the same protection of a verbatim record that is mandatory at trial.

---

[3] Certain pre-trial evidentiary rulings made by Judge Duplantier regarding psychiatric testimony on the issue of pre-impact pain and suffering, applicable to all wrongful death actions arising from this crash, were not recorded. Accordingly, in *Pregeant v. Pan American World Airways, Inc.*, No. 84-3136, now under appellate consideration by the Fifth Circuit, a dispute over those evidentiary rulings arose at trial, after the case had been transferred to a magistrate by Judge Duplantier. The dispute is now an issue on appeal, but appellate review may be thwarted because there is no record of these pre-trial rulings. Immediately after the *Pregeant* trial, petitioners moved the district court to conduct pre-trial proceedings on the record.

The statutory language of 28 U.S.C. §753(b) is controlling. Had Congress intended the right of verbatim recordation to be limited to trial only, such a restriction would have been incorporated, and the statute would not have contained the broader term "proceedings".

CONCLUSION

For the reasons set forth above, it is submitted that this petition for writs of mandamus and prohibition should be granted.

Respectfully submitted,

FRANCIS G. WELLER
755 Magazine Street
New Orleans, Louisiana 70130
Telephone: (504) 581-5141

Counsel for Petitioners,
Pan American World Airways, Inc.
and United States Aviation
Underwriters, Incorporated

ROBERT E. KERRIGAN, JR.
EMMET J. SCHWARTZMAN
DEUTSCH, KERRIGAN & STILES
(Of Counsel)

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Petition for Writs of Mandamus and Prohibition have been served on respondent, The Honorable Adrian G. Duplantier, United States District Judge, Section "H", Eastern District of Louisiana, 500 Camp Street, New Orleans, Louisiana, 70130, by either hand delivery or by depositing same in the United States mail, properly addressed and postage prepaid, this ____ day of March, 1985.

FRANCIS G. WELLER

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-3037

IN RE:
PAN AMERICAN WORLD AIRWAYS, INC., ET AL.

Petitioners

RESPONSE BY DISTRICT JUDGE TO
APPLICATION FOR WRITS OF MANDAMUS AND
PROHIBITION

Status conferences and pre-trial conferences in the Eastern District of Louisiana (and probably in every other U.S. District Court in the nation) are not conducted in the presence of a court reporter, official or otherwise. A pre-trial order is entered at the conclusion of the pre-trial conference, which recites the action taken there, and if any action is taken at a status conference a minute entry is issued by the court to memorialize it.

The litigation resulting from the Pan American air crash is no longer complex, if indeed it ever was. It has been difficult, however, and has been made significantly more difficult by activity of defense counsel such as this writ application. Because of the number of claims being handled, and because some of the procedure being utilized to expedite these claims was not typical, about a year ago the undersigned granted Pan American's counsel's request to

bring a private reporter to status conferences and pre-trial conferences. About a month ago, one of the other judges on this court, who had graciously agreed to relieve the undersigned by presiding at the trial of one of these cases, rejected a similar request by Pan Am with respect to the case he was handling. Later that day, that judge inquired as to whether the undersigned had granted such permission. My affirmative response brought forth a comment by the other judge questioning my good judgment, if not my sanity. Upon reconsideration, I decided to terminate this special privilege granted to Pan Am's counsel. When the private reporter engaged by Pan Am came to the next status conference, he was not "summarily ejected", as Mr. Weller (who did not attend the conference) suggests, but he was told that his presence would not be permitted.

There is simply no reason to have a court reporter attend status conferences or pre-trial conferences, and the presence of a reporter can be counter-productive. Often counsel can speak more frankly when their remarks are not being recorded verbatim. The only authority cited by the applicant for writs, 28 U.S.C. §753(b), does not apply to status conferences and pre-trial conferences. In all events, if any action taken at either a status conference or pretrial conference, is not covered by a minute entry or other order issued promptly by the court, counsel need only to call that to the court's attention and suggest that an appropriate order be entered. Rarely, if ever, are actions taken at such conferences the subject of appellate review.

It is abundantly clear that the taxpayers ought not to be subsidizing Pan Am's insurer's whim by providing an official reporter paid by the government. It is equally clear that there is no necessity for the presence of a private

reporter. Indeed, the presence of a private reporter may often hinder rather than expedite litigation.

The undersigned respectfully suggests that the petition for writs of mandamus and prohibition should be denied and that sanctions should be imposed upon petitioner for once again frivolously wasting the time of both the district and appellate court.

/s/ Signed
ADRIAN G. DUPLANTIER
U.S. DISTRICT JUDGE

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-3037

IN RE:
PAN AMERICAN WORLD AIRWAYS, INC., ET AL.

Petitioners

ON PETITION FOR
WRIT OF MANDAMUS AND/OR PROHIBITION TO
THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

Before GEE, JOHNSON and DAVIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus and/or prohibition is DENIED.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-3037

IN RE:
PAN AMERICAN WORLD AIRWAYS, INC., ET AL.

Petitioners

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., 198__, __ F.2d __)

Before GEE, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of

Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Signed

United States Circuit Judge

APPENDIX "D"

Pan American World Airways, Inc., has no parent company. Its subsidiaries, and their places of incorporation, are:

Acerias Paz del Rio, S.A. (Colombia)
Aeronautical Radio, Inc. (Delaware)
Agropecuaria Fluminense, S.A. (Brazil)
Air Cargo, Inc. (Delaware)
Air Carrier Supply, Inc. (Florida)
Airline Tariff Publishing Company (Washington, D.C.)
Ariana Afghan Airlines Co. Ltd. (Afghanistan)
Compania Hoteleira Novos Horizontes, S.A. (Brazil)
Delsud Inversora (Argentina)
Escola Americana de Rio de Janeiro (Brazil)
Hadrian Ltd. (Bermuda)
Honolulu Fueling Facilities Corporation (Hawaii)
International Aeradio (Caribbean) Ltd. (Trinidad)
Liberian Development Corporation (Liberia)
Manhattan Air Terminal, Inc. (New York)
Middle East Real Estate Company, S.A.L. (Lebanon)
New York Airways, Inc. (Delaware)
Pan Am Florida, Incorporated (dissolved—January 8, 1980)
Pan Am Thrift Way, Ltd. (Great Britain)
Pan Am World Services, Inc. (formerly Pan American Technical Services, Inc.) (Florida)
Pan American Airways de Mexico, S.A. de C.V. (Mexico)
Pan American Asset Management, Inc. (Delaware)
Pan American Energy, Inc. (Delaware)
Pan American World Airways South Africa, Pty., Ltd. (South Africa)

Private Investment Company for Asia, S.A. (Malaysia)
Promotora de Hoteles de Turismo Medellin, S.A. (Colombia)
Radio Aeronautica Paraguaya, S.A. (Paraguay)
Social Immobiliaria Norteamericana, S.A. (Argentina)
Societe de Tourisme et Representation (France)
Societe International de Telecommunications Aeronautiques (Belgium)

APPENDIX "E"

The following companies are members of the United States Aircraft Insurance Group which is managed by United States Aviation Underwriters:

Aetna Casualty & Surety Company
Continental Casualty Company
Employers' Insurance of Wausau
Hartford Fire Insurance Company
Highlands Insurance Company
Maryland Casualty Company
Nationwide Mutual Insurance Company
Reinsurance Company of New York
Reliance Insurance Company
Royal Indemnity Company
St. Paul Fire & Marine Insurance Company
The Travelers Indemnity Company
United States Fidelity & Guaranty Company
Zurich Insurance Company
State Farm Fire & Casualty Company